

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

SAM LIPSEY,

Case No. 16-cv-776-pp

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**ORDER DISCHARGING ORDER TO SHOW CAUSE (DKT. NO. 4) AND
GRANTING UNOPPOSED MOTION TO STAY BRIEFING (DKT. NO. 6)**

The plaintiff filed this motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. §2255 on June 22, 2016. Dkt. No. 1. The petition asserts that the petitioner sentence was enhanced under U.S.S.G. §4B1.1, based on prior convictions for fleeing and officer and battery by a prisoner. Id. at 1. The petition alleges that after the United States Supreme Court's decision in Johnson v. United States, 135 S. Ct. 2551 (2015), these offenses no longer can be considered predicate offenses under the residual clause of the career offender guideline. Id.

On August 1, 2016, the court ordered the respondent to file a response to the petition by August 31, 2016. Dkt. No. 3. When the respondent failed to file anything by that date, the court issued an order to show cause, requiring that by September 30, 2016, the respondent show cause for its failure to comply with the court's August 1, 2016 order. Dkt. No. 4. On September 21, 2016, the respondent filed a motion to stay briefing. Dkt. No. 6. In that motion,

counsel explained that the petitioner's underlying case (filed in 2009) had been prosecuted by a different AUSA, that that person no longer was in the U.S. Attorney's Office, and that two other prosecutors had been assigned the case since then. Id. at 2. Although the AUSA who filed the instant motion had been assigned to the criminal case for purposes of handling a motion to reduce sentence, she indicates that she had not anticipated being assigned the *habeas* petition. Id. The court appreciates counsel's explanation, and considers the order to show cause discharged by this explanation.

In lieu of a response to the petition, the respondent filed the instant motion to stay briefing. Dkt. No. 6. The respondent notes that there are two cases currently pending before higher courts, the outcome of which could be determinative of the claim in the petition. The United States Supreme Court has granted certiorari in Beckles v. United States, Dkt. No. 15-8544. Pending before the Seventh Circuit is Cummings v. United States, Dkt. No. 16-1636. Both of these cases involve, among other issues, the question of whether the Johnson decision applies retroactively cases in which a defendant collaterally attacks his sentence on the ground that it was enhanced under the residual clause of §4B1.2(a)(2)—the very issue the petitioner raises. Id. at 1. The motion indicates that the petitioner does not object to the motion to stay. Id. at 2.

Accordingly, the court **ORDERS** that its September 13, 2016 order to show cause is **DISCHARGED**. Dkt. No. 4.

The court **GRANTS** the respondent's unopposed motion to stay briefing on the petition pending the United States Supreme Court's decision in Beckles.

Dkt. No. 6. The court **ORDERS** that all briefing in this case is **STAYED**. The court further **ORDERS** that, within thirty (30) days of the Supreme Court issuing its decision in Beckles, the respondent shall notify the court whether it intends to oppose the petition.

Dated in Milwaukee, Wisconsin this 26th day of September, 2016.

BY THE COURT:

A handwritten signature in black ink, consisting of a large, stylized 'P' followed by a horizontal line extending to the right.

HON. PAMELA PEPPER
United States District Judge